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January 20, 2023

Judicial Council of California
Rules Committee
Attention: The Honorable Carin T. Fujisaki, Chair
455 Golden Gate Avenue
San Francisco, California 94102-3688
E-mail: Eric.Long@jud.ca.gov; Kara.Portnow@jud.ca.gov

VIA E-MAIL AND WEB FORM

***Re*:** Invitation to Comment W23-11: Jury Instructions: Public Access and Publication

Dear Justice Fujisaki:

Public.Resource.Org ("**Public Resource**") writes to convey its strong support of the Rules Committee's proposed revisions to California Rules of Court, rule 2.1050, set forth in Invitation to Comment W23-11 ("**Invitation to Comment**").

In November of 2020, Public Resource respectfully requested that the Judicial Council of California ("**JCC**") revise rule 2.1050, consistent with federal copyright law, to clarify that the California Civil Jury Instructions ("**CACI**") and the California Criminal Jury Instructions ("**CALCRIM**") (collectively, the "**Jury Instructions**") are in the public domain. Public Resource also respectfully requested that the JCC make the corresponding change of removing all copyright claims and notices from CACI, from CALCRIM, and from related web pages on the Judicial Branch web site. Public Ressource submitted its proposal together with letters and statements of support from:

- 11 public interest organizations that seek to improve public access to the law: Electronic Frontier Foundation, Fix the Court, Public Citizen, First Amendment Coalition, Public Knowledge, Free Law Project, Creative Commons, American Civil Liberties Union Found. of Northern California, American Civil Liberties Union Found. of San Diego & Imperial Counties, American Civil Liberties Union Found. of Southern California, and the Wikimedia Foundation;
- The Office of the State Public Defender, the Habeas Corpus Resource Center, and the California Appellate Project;
- 338 law professors, law librarians, and legal practitioners, the East Bay Community Law Center, and the San Francisco Public Defender's Office;
- 120 law students, and 12 California law student organizations: Berkeley Law Wage Justice Clinic, Berkeley Journal of Gender, Law & Justice, Berkeley Technology Law

Journal, Hastings Law Journal, Intellectual Property and Technology Law Journal, King Hall Intellectual Property Law Association, Law and Political Economy Society, Law Students of African Descent, Middle Eastern & North African Law Students Association, Post-Conviction Advocacy Project, Pilipinx American Law Society, Public Interest Law & Technology; and

- Edward H. Schulman, a former Chief Assistant State Public Defender and member of the CALJIC Committee in Los Angeles from 1985-89.

Public Resource applauds the Rules Committee's proposed changes to rule 2.1050 and its continued commitment to making the Jury Instructions freely to the public. As noted in the Invitation to Comment, the proposed changes eliminate portions of rule 2.1050, subdivision (c) that implicitly referred to copyright protection, and "recommit[] to free public access for the jury instructions, including the council's continued provision of copies and updates of the approved jury instructions on the court's public website."

The proposed changes to rule 2.1050 would more fully realize California's longstanding and ongoing efforts to increase Californians' access to the law. California has set an impressive and important precedent by rendering its Jury Instructions in "plain English." (Judicial Council of Cal., Criminal Jury Instructions (2020) p. ix.) The JCC took this approach explicitly to increase access to the law for jurors. (See Judicial Council of Cal., Civil Jury Instructions (2020) p. xxiii.) The JCC additionally worked to increase public access to the law by posting the Jury Instructions on the Judicial Branch web site. (Cal. Rules of Court, rule 2.1050, subd. (c).) The proposed changes to rule 2.1050 would further these efforts by bringing California's Jury Instructions in line with federal copyright law, and specifically with the United States Supreme Court's decision in *Georgia v. Public.Resource.Org, Inc.* that, under the government edicts doctrine, government officials cannot author, and therefore cannot copyright, works they create in carrying out their official duties. ((2020) 140 S.Ct. 1498, 1504.)

Public Resource thanks the Rules Committee and the JCC for its careful work to correct this oversight. The government edicts doctrine, at heart, ensures access to the law. And access to the law is fundamental to California's administration of justice. "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." (Cal. Const. art. I, § 7, subd. (a).) Accordingly, " 'All are entitled to be informed as to what the State commands or forbids.' " (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115, quoting *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.) Because " '[e]very citizen is presumed to know the law,' " " 'it needs no argument to show . . . that all should have free access' " to its contents. (*Georgia*, *supra*, 140 S.Ct. at p. 1507, quoting *Nash v. Lathrop* (1886) 142 Mass. 29, 35.) Jury instructions in particular "are important because together they state the law that [jurors] will use." (CACI No. 5000.) Providing the law and legal materials for viewing alone is inadequate. (See *Building Officials & Code Adm. v. Code Technology, Inc.* (1st Cir. 1980) 628 F.2d 730, 736 [stating that the right to freely access the law includes "a necessary right freely to copy and circulate all or part of a given law for various purposes"].)

The proposed changes are thus essential to complying with federal copyright law, to serving the goals of the JCC, and to protecting public access to the law. Public Resource supports them fully.

Please do not hesitate to contact Jennifer Urban at jurban@clinical.law.berkeley.edu or (510) 642-7338 with any questions about this comment.

Sincerely,

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Jennifer M. Urban
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University of California, Berkeley, School of Law
Attorney for Public.Resource.Org
Pronouns: she, her, hers